STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of SABRINA CHAMBERS, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

SHAWN ALLEN WOODBURY,

Respondent-Appellant,

and

DEBRA JEAN CHAMBERS,

Respondent.

UNPUBLISHED
September 11, 2003

No. 245772
Washtenaw Circuit Court
Family Division
LC No. 01-025143-NA

In the Matter of CIARA CHAMBERS, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

SHAWN ALLEN WOODBURY,

Respondent-Appellant,

and

DEBRA JEAN CHAMBERS,

Respondent.

No. 245773
Washtenaw Circuit Court
Family Division
LC No. 01-025144-NA

In the Matter of CIARA CHAMBERS, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

DEBRA JEAN CHAMBERS,

Respondent-Appellant,

and

SHAWN ALLEN WOODBURY,

Respondent.

No. 245778
Washtenaw Circuit Court
Family Division
LC No. 01-025144-NA

In the Matter of SABRINA CHAMBERS, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

DEBRA JEAN CHAMBERS,

Respondent-Appellant,

and

SHAWN ALLEN WOODBURY,

Respondent.

No. 245785
Washtenaw Circuit Court
Family Division
LC No. 01-025143-NA

Before: Meter, P.J., and Talbot and Borrello, J.J.

PER CURIAM.

In these consolidated appeals, respondents Shawn Woodbury and Debra Chambers appeal as of right from the trial court's orders terminating their parental rights to the minor children at the initial dispositional hearing. The court terminated respondent Woodbury's parental rights under MCL 712A.19b(3)(a)(i)-(ii), (g) and (j), and terminated respondent Chambers' parental rights under MCL 712A.19b(3)(i), (k)(i) and (l). We affirm.

I. Docket Nos. 245772 and 245773

Respondent Woodbury first argues that he was not properly served with notice of the adjudicative hearing and, therefore, the court lacked jurisdiction to terminate his parental rights. We disagree.

Initially, we conclude that Woodbury waived review of this issue by failing to raise it below. When Woodbury appeared for the dispositional hearing, he did not contest the court's jurisdiction or challenge the propriety of service of process for the earlier adjudicative hearing. "A party who enters a general appearance and contests a cause of action on the merits submits to the jurisdiction of the court and waives service of process objections." *In re Slis*, 144 Mich App 678, 683; 375 NW2d 788 (1985). See also *Daines v Tarabusi*, 246 Mich 419, 421; 224 NW 416 (1929); *In re Gillespie*, 197 Mich App 440, 446-447; 496 NW2d 309 (1992). By voluntarily appearing in court and failing to challenge the service of process, Woodbury waived any alleged errors in the service of process. Because Woodbury also alleges that his counsel was ineffective for failing to raise this issue, we will address the merits of his argument.

Petitioner initially named Woodbury as a putative father in these proceedings. Woodbury has not shown that, as a putative father, he was entitled to notice of these proceedings under MCR 5.921(B).[1] Until a putative father establishes paternity, he is generally not entitled to notice of child protection proceedings and lacks standing to participate in the proceedings. *In re AMB*, 248 Mich App 144, 174; 640 NW2d 262 (2001); *In re NEGP*, 245 Mich App 126, 134; 626 NW2d 921 (2001). See also *In re CAW*, ___ Mich ___; 665 NW2d 475, 478 (2003). Thus, until Woodbury established paternity, the trial court was obligated to follow MCR 5.921(D).

The trial court attempted to serve Woodbury with notice of the earlier hearings in accordance with MCR 5.921(D)(1),[2] but his last known address was not his current address. The record demonstrates that petitioner made reasonable efforts to locate Woodbury in Maine by following through with different leads, without success. Under the circumstances, it was not

[1] The court rules for child protective proceedings were amended and recodified as part of new MCR subchapter 3.900, effective May 1, 2003. This opinion refers to the rules in effect at the time of the trial court's decision.

[2] Although the language of the notice sent to respondent Woodbury at his last known address in Bangor, Maine, did not comport with MCR 5.921(D)(1), this substantive defect did not affect Woodbury's substantial rights because he apparently no longer resided at that location and never received the notice.

improper for the court to resort to notice by publication, given that other forms of service were impractical because Woodbury's whereabouts were unknown. MCL 712A.13; *In re Adair*, 191 Mich App 710, 713-714; 478 NW2d 667 (1991). Furthermore, publication in a newspaper in Washtenaw County was appropriate as the county where the trial court is located. Because Woodbury's whereabouts were unknown, publication notice in a newspaper in the county where he was then residing was not possible. See MCR 5.920(B)(5)(c). Thus, it was not plain error to provide Woodbury with notice of the adjudicative hearing by publication. Under MCR 5.921(D)(2)(a), it was appropriate for the court to proceed in his absence with the adjudicative trial.

Woodbury argues that petitioner erroneously relied on efforts to locate him made by the child support division in a related paternity action. We disagree. The child support division began searching for Woodbury before protective services became involved in this matter. When an employee of the child support division had previously contacted Woodbury, he denied paternity of the children and refused to cooperate with the agency. It was not improper for the agencies to share information and cooperate with each other in their mutual efforts to locate Woodbury.

Woodbury also argues that the procedures followed by the trial court denied him due process. Because Woodbury did not raise this issue below, he must demonstrate that a plain error affected his substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

Woodbury argues that his right to due process was violated because petitioner did not file a supplemental petition requesting termination of his parental rights. We disagree. Petitioner included a request to terminate Woodbury's parental rights at the initial dispositional hearing in the original petition filed. MCR 5.974(D). Contrary to what Woodbury asserts, the record does not indicate that petitioner agreed to dismiss the original petition in order to give Woodbury an opportunity to work on a parent-agency agreement. While Woodbury requested that opportunity, petitioner did not agree to it and the trial court never dismissed the petition for that reason. On these facts, there was no need for petitioner to subsequently file a supplemental petition requesting termination. MCR 5.974(E).

Woodbury also claims that the trial court lacked the requisite legally admissible evidence to both assume jurisdiction over the children and find that statutory grounds existed to terminate his parental rights at the initial dispositional hearing. See MCR 5.974(D)(3). We disagree. Petitioner's Exhibit 1 from the adjudicative hearing, a memorandum prepared by the child support division concerning its attempts to locate Woodbury, was legally admissible. Although the document contains two levels of hearsay, the statements that Woodbury made to the author of the report were admissible under MRE 801(d)(2)(A), as statements of a party opponent. Moreover, the author's statements concerning her investigation of the paternity action were admissible under MRE 803(8), as a public record prepared in the course of her duties. Woodbury has not demonstrated plain error on this basis.

Woodbury also argues that the trial court erred by relying on evidence from the paternity action. Although that action involved a separate proceeding, Woodbury has not demonstrated that plain error occurred for this reason. *Kern, supra*.

Next, Woodbury argues that trial counsel was ineffective. We review this issue by applying the test for ineffective assistance of counsel in criminal matters, even though the right to counsel in child protective proceedings is statutory, not constitutional. *In re AMB*, *supra* at 221-222; *In re Rogers*, 160 Mich App 500, 502; 409 NW2d 486 (1987). In order for this Court to reverse due to ineffective assistance of counsel, a respondent "must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced [him] as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). He must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, he must show that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). The burden is on the respondent to produce factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

As discussed previously, Woodbury has not shown that he was prejudiced by counsel's failure to challenge the service of process in this matter. Counsel's failure to raise any alleged due process violations likewise did not prejudice Woodbury. Further, Woodbury has not demonstrated that he was prejudiced when counsel excused himself from the dispositional hearing regarding termination of respondent Chambers' parental rights. The facts and circumstances of the two cases were distinct.

We likewise find no merit to Woodbury's argument that counsel failed to properly prepare a defense to the petition. The record indicates that counsel attempted to persuade the court not to terminate Woodbury's parental rights at the initial dispositional hearing in order to allow him the opportunity to demonstrate his parenting skills. Woodbury's actions affected what his counsel could argue. Woodbury refused earlier to participate in the paternity case or acknowledge paternity. He delayed in submitting to paternity testing. Even after the court agreed to allow him to submit to a psychological evaluation, he failed to appear for that appointment. On these facts, because Woodbury did little to show that he could parent the children, counsel had little to work with. Woodbury has not overcome the presumption that this was sound strategy under the circumstances, nor has he explained what other defense counsel realistically could have presented.

The existing record also does not support Woodbury's claim that his attorney was ineffective for failing to request the appointment of a guardian ad litem for him. Woodbury fails to allege how a defense of mental incapacity for the issue of child abandonment would have changed the outcome in this case. Lastly, although Woodbury argues that counsel was ineffective for failing to raise issues regarding the Michigan Adoption Code, MCL 710.21 *et seq.*, he has not shown the relevancy of that code to this proceeding. Therefore, Woodbury has not demonstrated that he is entitled to relief due to ineffective assistance of counsel.

II. Docket Nos. 245778 and 245785

Respondent Chambers first argues that MCL 722.638 violates her constitutional rights to equal protection and due process, because the statute creates different classifications of parents, i.e., those who have had their parental rights terminated to other children in the past and those who have not. This Court previously rejected this argument in *In re AH*, 245 Mich App 77, 79-

85; 627 NW2d 33 (2001). Although Chambers attempts to factually distinguish *In re AH*, the pertinent holding in that case concerned a question of law. We therefore reject Chamber's argument that it is not controlling.

Chambers further argues that the trial court erred in finding that the statutory grounds for termination were proven by clear and convincing evidence. We review the trial court's findings of fact under the clearly erroneous standard. *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. MCR 5.974(I); *In re JK*, *supra* at 209-210. Deference must be accorded to the trial court's assessment of the credibility of the witnesses who appeared before it. *In re Newman*, 189 Mich App 61, 65; 472 NW2d 38 (1991). Once a statutory ground for termination is established by clear and convincing evidence, pursuant to MCL 712A.19b(5), "the court must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests." *In re Trejo*, 462 Mich 341, 354; 612 NW2d 407 (2000). The court should decide the "best interests" question based upon all of the evidence presented and without regard to which party produced the evidence. *Id*. at 353-354. The court's decision regarding the child's best interests is also reviewed for clear error. *Id*. at 356-357.

The trial court did not clearly err in finding that the statutory grounds for termination were proven by clear and convincing evidence. There was no dispute that Chambers' parental rights to two older children were terminated by the courts in Maine in 1997 and 1998. The facts surrounding the earlier cases support the court's finding here that §§ 19b(3)(i), (k)(i) and (l), were each proven by clear and convincing evidence.

Chambers further argues that the evidence did not show that the children were at risk of unreasonable harm while in her custody. Although MCL 722.638 requires that there be an unreasonable risk of harm to a child before a petitioner may seek to have the parent's rights terminated at the initial dispositional hearing, the statute does not require that the court also find an unreasonable risk of harm to a child before it may terminate the parent's rights to the child. See MCR 5.974(D). Thus, MCL 722.638 was not applicable to the court's decision.

Finally, the trial court did not clearly err in its consideration of the children's best interests. Chambers was a teenager when her parental rights to her two older children were terminated in Maine. Although it is clear that, since moving to Michigan, she has matured in some respects, she clearly was still unable to provide a stable home for the children. Despite the progress she made, she failed to demonstrate that she could safely care for the children on her own or provide them with the permanence they required. The court found that the children could not wait to see if Chambers could eventually succeed in these areas. We cannot say that the court clearly erred in finding that termination of Chambers' parental rights was in the children's best interests.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Stephen L. Borrello